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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986  
\_\_\_\_\_

ROBERT ONG HING and ALICE HING,  
*Petitioners,*

*vs.*

HARVEY R. McELHANON and  
DOREEN T. McELHANON,  
*Respondents.*

\_\_\_\_\_

PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT FOR THE STATE OF ARIZONA

\_\_\_\_\_

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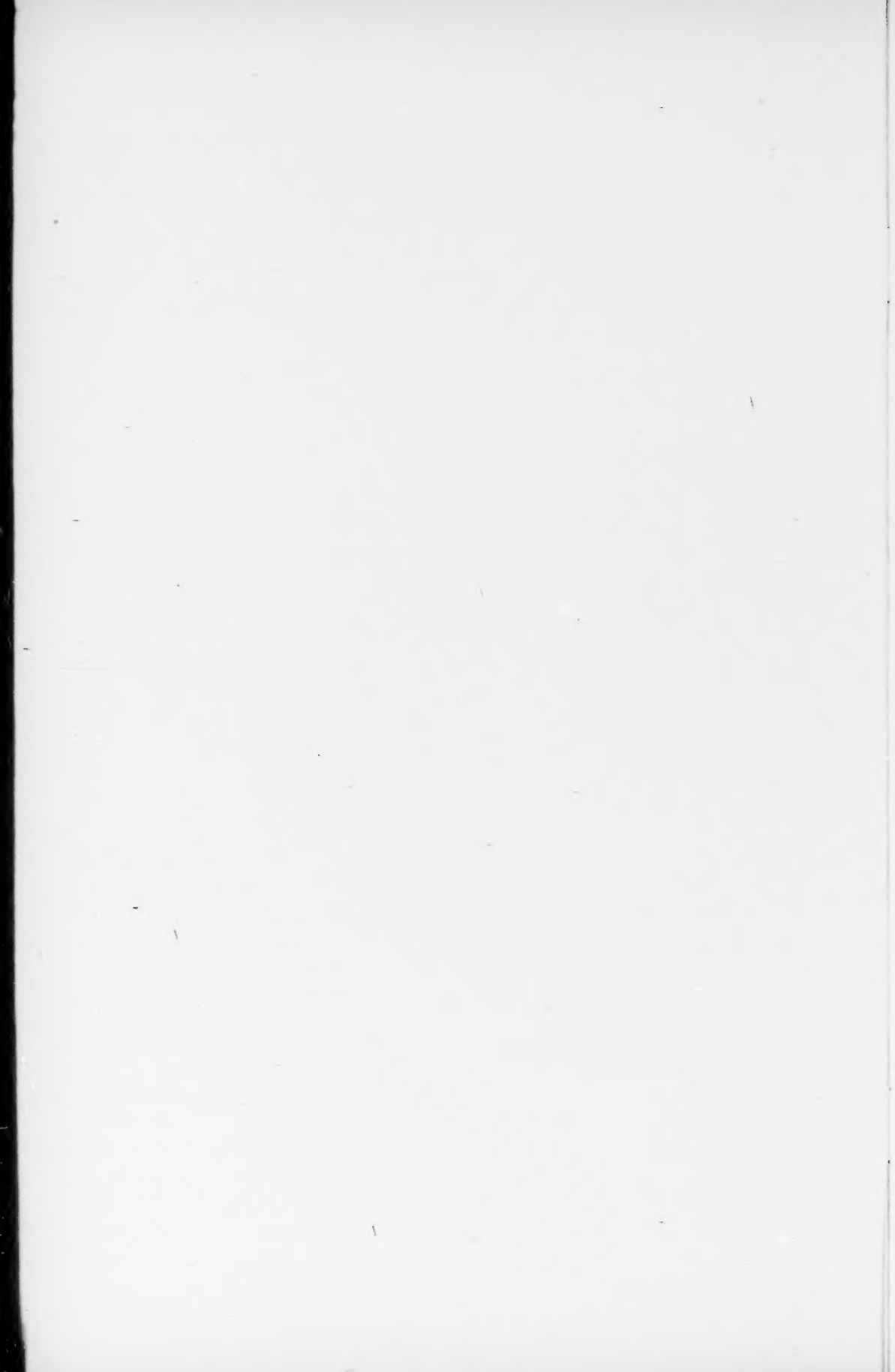
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### **Question Presented**

Did the Arizona Supreme Court deprive petitioners of their absolute state right to appellate review, and thereby deny them their right to due process under the Fourteenth Amendment, by denying them review of one of the material issues raised by them on appeal?

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**List of Parties**

The caption of the instant Petition contains the names of all parties to the proceedings in the Arizona Supreme Court, whose opinion and order are sought to be reviewed.

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**IN THE SUPREME COURT  
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October Term, 1986

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**ROBERT ONG HING and ALICE HING, Petitioners,**  
**vs.**

**HARVEY R. McELHANON and**  
**DOREEN T. McELHANON, Respondents.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT FOR THE STATE OF ARIZONA**

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Petitioners, Robert Ong Hing and Alice Hing, respectfully pray that a writ of certiorari issue to review the Arizona Supreme Court's opinion, entered November 3, 1986, and its order denying petitioners' Motion for Reconsideration, entered December 16, 1986, in the above captioned matter.

**Opinions Below**

The opinion of the Arizona Supreme Court is reported at \_\_\_\_ Ariz. \_\_\_\_, 728 P.2d 273, and is reprinted in the appendix at page A-1. The opinion of the Arizona Court of Appeals is reported at \_\_\_\_ Ariz. \_\_\_\_, 728 P.2d 256, and is reprinted in the appendix at page A-19.

**Jurisdiction**

The opinion of the Arizona Supreme Court, affirming the judgment of the Maricopa County Superior Court, was entered on November 3, 1986. On December 16, 1986, the

Arizona Supreme Court denied petitioners' timely Motion for Reconsideration.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(3).

### **Constitutional and Statutory Provisions Involved**

1. The *U.S. CONST. amend. XIV, § 1*, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. *Ariz. Rev. Stat. Ann. § 12-2101* provides, in relevant part:

A. An appeal may be taken to the court of appeals from the superior court in the instances specified in this action.

B. From a final judgment entered in an action or special proceeding commenced in a superior court . . .

\* \* \*

F. From an order:

1. Granting or refusing a new trial . . .



3. The *Arizona Const.*, Art. 6, § 2 provides, in relevant part:

"The decisions of the [Supreme] court shall be in writing and the grounds stated."

### Statement of the Case

In this civil action, a money-judgment in the amount of \$286,120.00, plus interest and costs, was rendered against petitioners in favor of respondents. Petitioners appealed that judgment to the Arizona Court of Appeals. On appeal, petitioners raised seven issues.<sup>1</sup> The Arizona Court of Appeals rejected petitioners' arguments on issues one through five. On issue number six, the Court of Appeals reversed the trial court judgment and remanded the case for a new trial. The Court of Appeals did not reach issue number seven: "[w]hether the trial court erred in refusing to grant a mistrial for numerous prejudicial statements made by McElhanon, and for admitting inadmissible evidence against Hing"; "[b]ecause we have determined to reverse, we need not consider the final issue raised in the opening brief which deals with prejudicial statements by McElhanon and the introduction of inadmissible evidence against Hing. With proper control these matters should not arise in any retrial of this case." (See appendix page A-48.)

Respondents petitioned the Arizona Supreme Court for review of the Court of Appeals' opinion and order of remand. Petitioners also filed a Petition for Review to the Arizona Supreme Court, wherein they raised issue number seven as an alternate basis for affirming the Court of Appeals' order of remand.

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<sup>1</sup> The substance of those issues, aside from issue number seven quoted later in the text, is not material to this petition for certiorari. For convenience, the seven issues are referred to throughout this petition by the numbers they bore in petitioners' brief to the Arizona Court of Appeals.

The Court denied petitioners' Petition for Review. The Arizona Supreme Court granted review on respondents' petition, that is, as to issue number six.<sup>2</sup> (See appendix page A-52.) Later, the Court ordered supplemental briefing on specific questions pertaining to issue number six. (See appendix page A-54.)

In its subsequent opinion, the Arizona Supreme Court approved the Court of Appeals' opinion on issues one through five (although the Arizona Supreme Court had not granted review of those issues), but it reversed on issue number six, vacated the order for new trial, and affirmed the trial court judgment. (See appendix pages A-17-A-18.) The opinion of the Arizona Supreme Court did not review issue number seven.

Petitioners filed a timely Motion for Reconsideration, urging the Supreme Court to remand the case to the Court of Appeals for consideration of issue number seven. In that Motion, petitioners raised the federal constitutional issue on which the instant petition is based. (See appendix page A-61.) On December 16, 1986, the Arizona Supreme Court without opinion, denied the Motion for Reconsideration. (See appendix page A-56.)

### **Reasons for Granting the Writ**

It is well established that federal constitutional guarantees of due process apply to appellate review, if such review is granted by state law. The Arizona Supreme Court's refusal to permit the Court of Appeals to review one of the material issues raised by petitioners on appeal,

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<sup>2</sup> The Court's order states that review is granted as to "Petitioners' (McElhanon) issue one." (See appendix page . . .) Issue one in respondents McElhanons' Petition for Review is the same as petitioners' issue number six, which was the basis for the Court of Appeals' decision to reverse and remand.

effectively denied petitioners their statutory right to appellate review, in contravention of existing federal precedent.

The Arizona Supreme Court concluded that petitioners' case had received "all of the scrutiny that the judicial system can afford" (See appendix page A-16.), but refused, despite proper requests by petitioners, to consider or rule upon petitioners' issue number seven. A state court should not be entitled, when issues are undetermined, to decide arbitrarily that there has been enough scrutiny. Whether a state supreme court has the right to decide arbitrarily that a case has received enough justice is an issue of importance to all litigants seeking to exercise their right of appellate review, and is deserving of this Court's attention.

This issue is of considerable importance to the administration of justice in the United States. Courts of appeals typically decline to decide issues they need not reach. When an intermediate appellate court does so decline to decide an issue, there is imposed upon the higher appellate court the duty, if it reverses the intermediate court, not to ignore the undecided issue.

Although difficult to quantify, it is likely that the situation occurs with enough frequency to warrant guidance from this Court as to a state supreme court's responsibility. For example, the same unjust result in this case recently occurred in another Arizona case. In *Mister Donut of America, Inc. v. Harris*, 150 Ariz. 347, 723 P.2d 696 (App. 1985), *vacated*, 150 Ariz. 321, 723 P.2d 670 (1986), the appellant challenged on appeal its liability for fraud and the amount and award of punitive damages. *Id.*, 150 Ariz. at 350, 723 P.2d at 699. The Court of Appeals reversed and remanded on the liability issue, but it did not reach, because of its disposition of the matter, the issue of whether punitive damages were justified or their amount. The Arizona Supreme Court vacated the Court of Appeals' decision without consideration of the punitive damage issue. A Motion for Reconsideration requested remand for a determination of the issues which were not decided, but that Motion was denied.

(A copy of the Motion for Reconsideration is included in the appendix at page A-68.)

Because of the difficulty in discovering these cases, these cases may well be only the tip of the iceberg. Two published cases within a six month period suggests a continuing problem.

Whether a state supreme court has the power to decide arbitrarily, without considering all issues properly raised, that it will not hear, or will not remand the case for, undecided issues, or that enough justice has been granted, is an important federal question that this Court should decide.

## I.

### **Litigants in Arizona Have an Absolute Right to Appeal Superior Court Judgments**

Arizona provides litigants with a right of appellate review:

A. An appeal may be taken to the court of appeals from the superior court in the instances specified in this section.

B. From a final judgment entered in an action or special proceeding commenced in a superior court . . .

\* \* \*

F. From an order:

1. Granting or refusing a new trial . . .

Ariz. Rev. Stat. Ann. § 12-1201. The Arizona Constitution requires that "The decisions of the court shall be in writing and the grounds stated." Ariz. Const. Art. 6, § 2. "[T]he

Court of Appeals must on appeal from a final judgment review all orders and rulings assigned as error", *Dean v. Powell*, 111 Ariz. 219, 221, 526 P.2d 1241, 1243 (1974); *Matter of Estate of Kerr*, 137 Ariz. 25, 28, 667 P.2d 1351, 1354 (App. 1983), other than those which are not essential to dispose of the case on appeal. *Vigil v. Herman*, 102 Ariz. 31, 36-37, 424 P.2d 159, 164-165 (1967).

It has been stated that "[I]f a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review". *Lindsey v. Normet*, 405 U.S. 56, 77 (1971). But, where a state does grant appellate review, the Equal Protection and Due Process Clauses apply. *See, e.g., Griffin v. People of the State of Illinois*, 351 U.S. 12, 18 (1956).

Having chosen to provide litigants with a right of appeal, Arizona must "act in accord with the dictates of the [federal] Constitution — and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). *See also National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43 (1954) ("[A] statutory review is important and must be exercised without discrimination").

In *Griffin v. Illinois*, this Court held that where a state required an appellant to submit a transcript in order to appeal, its refusal to provide a transcript to an indigent defendant violated the Due Process Clause. In *Douglas v. California*, 372 U.S. 353 (1967) this Court struck down a state procedure requiring an indigent defendant to demonstrate the merits of his case before he could obtain counsel on appeal. "When an indigent is forced to run this gantlet [sic] of a preliminary showing of merit, [without benefit of counsel] the right to appeal does not comport with fair procedure." *Id.*, 372 U.S. at 357. An indigent "has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Id.*, 372 U.S. at 358. "[A] State can, consistently with the Fourteenth Amendment, provide for differences [in appellate review] so long as the result does

not amount to a denial of due process or an 'invidious discrimination.' (Citations omitted)" *Id.*, 372 U.S. at 356-357.

In *Evitts v. Lucey*, this Court extended the holding in *Douglas* to require effective assistance of counsel on appeal. "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the *effective* assistance of an attorney." (Emphasis added) *Evitts*, 469 U.S. at 396. In *Evitts*, this Court reaffirmed *Ross v. Moffitt*, 417 U.S. 600 (1974), and held "due process concerns were involved in [*Griffin* and *Douglas*] because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts*, 469 U.S. at 405.

See also, *Texaco Inc. v. Pennzoil Company*, 784 F.2d 1133 (2d Cir. 1986) *prob. jurisd. noted* \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 3270 (1986). There, the Second Circuit found that Texas' mandatory lien and bond requirements, necessary to stay the execution of a judgment, could reduce Texaco's appeal to a meaningless ritual because Texaco, the appellant, could not possibly satisfy the requirements without going into bankruptcy:

Thus an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor's property without due process. A serious question presenting fair grounds for litigation is therefore raised by Texaco's claim that enforcement of Texas' lien and bond requirements would reduce its appeal to a meaningless ritual. Since Texaco would be bankrupt or in liquidation by the time its appeals were decided the hardship to it would



be immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits.

*Id.*, 784 F.2d at 1154.

## II.

### **The Arizona Supreme Court's Refusal to Remand Denied Petitioners Their Absolute Right of Appeal, In Violation of the Due Process Clause**

In the instant case the refusal of the Arizona Supreme Court to remand the seventh issue to the Court of Appeals for review deprived petitioners of due process to the same extent as if there were no Arizona procedure for review to the Supreme Court and the Court of Appeals had arbitrarily refused to consider that issue. The Arizona Court of Appeals did not consider the seventh issue raised in petitioners' brief, because it decided to grant a new trial. This action complied with the state practice described in *Vigil v. Herman*, 102 Ariz. 31, 424 P.2d 159 (1967). However, when the Supreme Court reversed the Court of Appeals' order granting a new trial, consideration of the seventh issue was no longer unnecessary, but it became essential to a complete and fair disposition of the appeal. The Arizona Supreme Court was required by due process to review, or to permit the Court of Appeals to review, the seventh issue.

Indeed, remand to the Court of Appeals is the practice followed by this Court. *See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164, 181-182 (1976) (Contention raised by appellee in support of lower court judgment, which was not addressed by Court of Appeals, could be considered on remand); *Cory Corporation v. Sauber*, 363 U.S. 709, 712 (1960) (Where Court of Appeals reversed lower court based on erroneous decision that horsepower was not a permissible test of what constituted, for excise tax purposes, self-contained units, and did not reach ques-

tion of revenue ruling intent, Supreme Court would remand case to Court of Appeals for consideration of "that and any other questions which may remain."); and *Logue v. United States*, 412 U.S. 521 532-533 (1973) (In suit against U.S. under Federal Tort Claims Act for wrongful death of prisoner, where Court of Appeals did not consider, apart from other issues on appeal from judgment, "the distinct question regarding the negligence of [the U.S. Marshall] . . . the parties' arguments on that question should be addressed in the first instance to the Court of Appeals" on remand).

The Arizona Supreme Court's opinion and order denied petitioners their federal constitutional right of due process, which guarantees them a full review, exercised fairly and without discrimination. The Arizona Supreme Court arbitrarily decided that petitioners' case had lasted too long and had received "all of the scrutiny that the judicial system can afford." (See appendix page A-16.) The Arizona Supreme Court's opinion suggests that justice is a commodity and litigants are entitled only to so much of it as the Arizona Supreme Court sees fit to grant.

Petitioners' due process rights have been denied. It is respectfully requested that this Court correct that error and require that the Arizona appellate court give petitioners their appellate review of right in this matter.



**Conclusion**

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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